SUPREME COURT OF FLORIDA

CASE NO. 96,629

INQUIRY CONCERNING A JUDGE NO. 99-09
RE: Patricia A. Kinsey

JUDGE PATRICIA A. KINSEY'S SUPPLEMENTAL ANSWER BRIEF

On Review of the
Findings, Conclusions and Recommendations by the
Hearing Panel of the Judicial Qualifications Commission

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SUMMARY OF ARGUMENT

The statements made by Judge Kinsey in campaign literature and during her radio debate with the incumbent, which are the basis for Charges No. 1, 2, 3, 4, 5, 10 and 12, are constitutionally protected speech under the First Amendment and did not violate the Code of Judicial Conduct.

Judge Kinsey's publication in a campaign brochure of details of the pending cases *State of Florida v. Stephen Johnson* and *State of Florida v. Gerard Alsdorf,* which is the basis of Charge No. 10, was protected speech under the First Amendment and did not violate the Code of Judicial Conduct.

Any mistakes in Judge Kinsey's statements in campaign literature about the incumbent's treatment of the defendant's parents and the bond in the *Heller* case and the initial charges in the *Johnson* case, which are the basis of Charge No.'s 7 & 9 were at worst honest mistakes and not done with intent to gain unfair advantage by making knowing misrepresentations and did not violate the Code of Judicial Conduct.

ARGUMENT

THE *WHITE* DECISION RENDERS THE PLEDGES OR PROMISES CLAUSE OF CANON 7(A)(3)(d)(i), AS WELL AS THE ANNOUNCE CLAUSE OF CANON 7(A)(3)(d)(ii), UNCONSTITUTIONAL AS APPLIED TO THE FACTS OF THIS CASE

It is easy to understand why JQC argues the *White* decision has no effect on any provision of Florida's Code of Judicial Conduct other than Canon 7(A)(3)(d)(ii) as both The American Bar Association and The Florida Bar adamantly oppose judicial elections. During the 2000 campaign The Florida Bar spent substantial bar funds promoting passage of a proposed constitutional amendment which would have ended election of trial judges and made them subject to a merit retention process.[1]

During Judge Kinsey's hearing JQC took the position it was improper for her to criticize any action taken by the incumbent as criticism of his actions implied she would have done things differently under the same circumstances and was therefore an improper pledge or promise of how she would rule in the future. If this argument is followed to its logical conclusion, a judicial candidate could never properly criticize any action taken by an incumbent. This is apparently what JQC seeks to accomplish.

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[1] While excellent arguments were made by the Bar and other supporters of merit retention, voters were apparently swayed by opposition arguments as every jurisdiction in Florida voted overwhelmingly to reject merit retention and continue electing trial judges.

Judge Jeffrey D. Swartz, chairman of the Judicial Ethics Advisory Committee, is quoted in the August 1, 2002 issue of The Florida Bar News as saying the U. S. Supreme Court's decision in *White*:

> Has no impact on the statutory or code provisions which regulate judicial elections in Florida.
>
> All a candidate can tell you is: 'I love the law. I believe in the law. Are there things I don't like about the law? Yes, but as a judge, it's my job to enforce the law the way it's written, and that's what I'm going to do.' Asking judges to do more is committing them to a course of action they cannot carry out.[2]

JQC's arguments in Judge Kinsey's case, however well intended, would prevent candidates from providing voters with information necessary to make informed and reasoned choices. There is possibly a compelling state interest sufficient to allow prohibition of some form of pledges or promises. However, statements making voters aware of current problems, an incumbent's job performance, or a candidate's philosophical approach to these problems are not "pledges or promises" that may be permissibly restricted under the First Amendment.

JQC argues *White* is inapplicable to this case because Judge Kinsey is being disciplined for violation of the "pledges or promises clause" and the Court did not

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[2] Judge Swartz apparently did not address how a challenger could properly, or practically, respond to an incumbent's claim that he should be re-elected because of his "experience" and lack of criticism of his job performance.

specifically rule on that section of the Minnesota Code of Judicial Conduct. The fallacy of this argument is that regardless of whether the state attempts to restrict a judicial candidate's speech by using the "announce" clause, the "pledges or promises" clause, or some other vehicle, all attempted restrictions must pass the same "strict scrutiny" test before they are permissible. As Justice Scalia points out in discussing the "obvious tension between Minnesota's popularly approved Constitution which provides that judges shall be elected,[3] and the Minnesota Supreme Court's announce clause which puts most subjects of interest to the voters off limits":

> . . . the First Amendment does not permit it to achieve its goal by leaving the protection of elections in place while preventing candidates from discussing what the elections are about. "[T]he greater power to dispense with elections altogether does not include the lesser power to conduct elections under conditions of state-imposed voter ignorance. If the State chooses to tap the energy and the legitimizing power of the democratic process, it must accord the participants in that process . . . the First Amendment rights that attach to their roles. See slip opinion at 22.

However, while Minnesota's "announce" clause was the vehicle that brought the *White* case before the court, the essence of the decision is its delineation of the extent to which the First Amendment prohibits restriction of judicial candidates' campaign speech. Careful reading of the decision leads to the conclusion that even if the "pledges or promises" clause is not unconstitutional on its face (which Justice

[3] All Minnesota judges, not just trial level judges, are subject to election.

Kennedy apparently believes it is), it is unconstitutional as applied by JQC to the statements in Judge Kinsey's campaign brochures and radio interview.

Interestingly, the candidate in *White* was also subject to a "pledges or promises" clause.[4] Early in its analysis of the constitutionality of the "announce" clause, the Court pointed out the Minnesota Lawyers Board had not disciplined the petitioner for a statement in his campaign literature which criticized a Minnesota Supreme Court decision holding confessions by criminal defendants were inadmissible as evidence unless they had been tape recorded. The statement, which the Minnesota Lawyers Board found did not violate the announce clause, was "[s]hould we conclude that because the Supreme Court does not trust police, it allows confessed criminals to go free." (slip opinion at 4-5). Although not directly stated by the Court, the Lawyers Board apparently found this did not violate the "pledges and promises" clause[5] even

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[4] The Minnesota Code of Judicial Conduct contains a "pledges or promises" clause in addition to an "announce" clause.

[5] On July 1, 2002, the New York Court of Appeals held that a judicial candidate's statement in campaign literature identifying herself as a "Law and Order Candidate" was not a violation of the "pledges and promises" clause. Finding the phrase was widely and indiscriminately used in everyday parlance, the court did not find it necessary to even address First Amendment issues. The New York equivalent of the JQC had contended the phrase improperly promised stern treatment of criminal defendants and referred to former President Nixon's promise to appoint "law and order" judges to reverse unwarranted judicial leniency toward criminal defendants. In the Matter of Honorable Elizabeth A. Shanley, Justice of the Esopus Town Court, Ulster County, SCJC No. 83 (Decided July 1, 2002).

though it implied the candidate would be tough on crime and support the police.

JQC states in its supplemental brief that the Court in *White* noted the "announce" clause was extremely broad:

> We know that "announc[ing] . . . views"covers more than promising to decide an issue a particular way. The prohibition extends to the candidates mere statement of his current position, even if he does not bind himself to maintain that position after election. (slip opinion at 4)

While the "announce" clause may be broader than the "pledges or promises" clause, the problem arises when attempting to position the dividing line between the constitutionally impermissible prohibition of a candidate's announcing his view on a particular issue and what under narrow circumstances may be a constitutionally permissible restriction on speech because it is a "pledge or promise" of specific future conduct in office.

Judge Kinsey's campaign centered on job performance and judicial philosophy; there were no attacks on any aspect of the incumbent's personal life.[6] The incumbent had been a county judge for twelve years. During that time he had gained the reputation of being anti-law enforcement.[7] He had also earned a reputation for mistreating victims

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[6] During the first citizens' forum where both candidates appeared, Judge Green criticized Judge Kinsey's candidacy by telling the audience, "It's just not right to run against a sitting judge."

[7] There was uncontradicted testimony at the JQC hearing that Judge Green had the nickname "Let 'em go Green" long before the campaign and law enforcement

of crimes who appeared before him.[8] One reason she ran against him was a statement he made while she was an assistant state attorney assigned to his court that "if the only evidence I have in a criminal case is the testimony of a law enforcement officer and the testimony of the defendant, I rule for the defendant every time."[9]

In her campaign literature and during the radio debate with the incumbent, Judge Kinsey attempted to provide voters information they could use to evaluate the two candidates and decide which would be the better judge. During the years she observed the incumbent perform his judicial duties, what she saw convinced her he consistently failed to hold criminals accountable for their actions. She believed judges have a responsibility to hold criminals properly accountable for their crimes and that judges do a disservice to the legal system, society, victims and criminal defendants when they fail in that duty. Since her philosophy was diametrically opposed to the incumbent's, she believed voters needed that information to make a reasoned choice.

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officers routinely asked the State Attorneys Office to nol pros cases assigned to him because officers knew they were wasting time appearing before him.

[8] Assistant state attorney Clara Smith testified she tried to keep victims away from Judge Green as much as possible and tried to prepare victims, especially in domestic violence cases, for what they would face in his court. His treatment of victims was so bad she rarely took a domestic violence case to trial before him. (Hearing transcript page 312. Hereafter cited as T:312).

[9] Assistant state attorney Clara Smith testified Judge Green made similar statements in open court on multiple occasions. (T: 309)

Judge Kinsey has consistently maintained the statements in her campaign brochures and radio interview are constitutionally protected speech. Even though the statements don't specify how she would decide particular issues or rule in individual cases, JQC argues they violate the "pledges or promises" clause of Canon 7 because the statements were "intended to convey her pro-police position to the voters." Even if this were a correct interpretation of what she was attempting to convey, this attempted restriction violates her First Amendment right to provide relevant information to voters. Perhaps as important, it violates the voters' right to receive information about the candidates. As Justice Kennedy points out on page 3 of his concurring opinion:

> What Minnesota may not do, however, is censor what the people hear as they undertake to decide for themselves which candidate is most likely to be an exemplary judicial officer. Deciding the relevance of candidate speech is the right of the voters, not the State.

Judge Kinsey's use of campaign brochures, such as the one entitled "Pat Kinsey: The Unanimous Choice of Law Enforcement for County Judge" was an effort to inform voters of the incumbent's anti-law enforcement attitude and repeated failures to hold criminals accountable. Although the brochure did contain the statement "police

officers expect judges to take their testimony seriously[10] and to help law enforcement by putting criminals where they belong . . . behind bars," this was an accurate reflection of the frustration law enforcement officers and victims felt as a result of their experiences with the incumbent. Statements of what particular groups expect, such as a reference to police officers' expecting judges to take their testimony seriously, are not speech the First Amendment permits government to restrict.[11]

One brochure contained a photograph of former assistant state attorney Kinsey (dressed in civilian clothes that did not in any manner resemble a judge's robe or suggest she was a judicial officer) with members of a police SWAT team. The legend above the photograph "Who do these guys count on to back them up?" reflected her many years of close work with law enforcement as an assistant state attorney. The brochure also stated she had been endorsed by both the Florida Police Benevolent Association and the Fraternal Order of Police, the two organizations that represent virtually every law enforcement officer in Escambia County. Since law enforcement officers observe judges on a daily basis, she felt voters were entitled to know how this

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[10] Two assistant state attorneys testified at the JQC hearing that law enforcement officers routinely asked to avoid court in Judge Green's division because of his attitude toward law enforcement and their cases. (T: 242-243, 310).

[11] The average voter would justifiably be concerned if a judge did not take police officers' testimony seriously.

highly respected group regarded her and the incumbent.

In order to find a violation of Canon 7, the JQC took the simple statements of what police expect and made a leap to their being a "pledge or promise" as "evidence that Judge Kinsey intended to convey her pro-police position to the voters." The fact police officers expect judges to "help" them (and society) by putting criminals behind bars where they belong does not in any way suggest a judge would fail to afford criminal defendants the benefit of all rights to which they are entitled.

JQC points out at page 11 of its supplemental brief that the hearing panel found Judge Kinsey "did not say she would help the public defenders appearing in her courtroom." Whether the incumbent failed to provide criminal defendants all rights to which they were entitled and how he treated public defenders were not issues in the campaign. However, if an incumbent judge does not take police officers' testimony seriously, or is not jailing criminals when a candidate, victims or law enforcement believe it is appropriate, voters are entitled to this information (even if the opinions are subject to debate). Voters should be able to compare a challenger's statements with information furnished by the incumbent before making their decisions, and a candidate cannot be constitutionally restricted from making such information available by simply labeling it a "pledge or promise."

JQC seems to imply Judge Kinsey acted improperly by making voters aware she

was supported by law enforcement. Although on page 10 of its supplemental brief JQC reluctantly acknowledges she could make voters aware of endorsements she received from the Florida Police Benevolent Association and the Fraternal Order of Police, it contends inclusion of language stating "police officers risk their lives every day" and "police officers expect judges to take their testimony seriously and to help law enforcement by putting criminals . . . behind bars" constituted an improper "pledge or promise." However, as Justice Scalia points out at page 8 of the majority opinion in *White*:

> the proper test to be applied to determine the constitutionality of such a restriction is what our cases have called strict scrutiny.
>
> Under the strict-scrutiny test, respondents have the burden to prove that the announce clause is (1) narrowly tailored, to serve (2) a compelling state interest. *E.g., Eu v. San Francisco County Democratic Central Comm.*, 489 U. S. 214, 222 (1989). In order for respondents to show that the announce clause is narrowly tailored, they must demonstrate that it does not "unnecessarily circumscrib[e] protected expression." *Brown v. Hartlage*, 456 U. S. 45, 54 (1982).

Although Justice Scalia was referring to the "announce" clause, the "pledges or promises" clause must meet the same test. Before JQC can constitutionally restrict Judge Kinsey's speech, there must first be a compelling state interest sufficient to require this extreme protection. If such a compelling state interest can be demonstrated, JQC must then demonstrate the restriction, as applied to the statements

made, is so narrowly tailored that it does not "unnecessarily circumscribe" her constitutionally protected expression or the voters' right to information.

In *White*, Minnesota contended preservation of the "impartiality of the state judiciary" and "preservation of the appearance of impartiality of the state judiciary" were compelling state interests sufficient to allow the announce clause to pass constitutional requirements.[12] In analyzing whether these two interests were sufficient to render the "announce" clause constitutional, the Court considered several possible meanings of "impartiality" and found none were sufficient to allow the "announce" clause to survive the strict scrutiny test.

JQC contends the same two "compelling state interests" support application of the "pledges or promises" clause to statements in Judge Kinsey's campaign brochures and radio debate. Even if these are "compelling state interests" which would permit restriction of speech under some circumstances, the clause is not sufficiently narrowly tailored to survive constitutional scrutiny as applied to Judge Kinsey's campaign literature and debate. The statements alleged in Charges No.'s 1, 2, 3, 4, 5, 10 and 12 are constitutionally protected.

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[12] The JQC hearing panel found the same two compelling state interests justified the constitutionality of Florida's "announce" and the "pledges or promises" clauses.

THE *WHITE* DECISION SUPPORTS JUDGE KINSEY'S POSITION THAT HER COMMENTS REGARDING TWO PENDING CRIMINAL CASES WERE CONSTITUTIONALLY PROTECTED

JQC Charge No. 10 alleges Judge Kinsey violated Canon 1, Canon 2(a), Canon 3(B)(5), Canon 3(B)(9), and Canon 7(A)(3)(d)(ii) by including factual details of two pending criminal cases, *State of Florida v. Stephen Johnson* and *State of Florida v. Gerard Alsdorf*, in a campaign brochure. The incumbent had presided at the first appearances[13] in both cases and set bonds which would have permitted two extremely dangerous individuals to be released into the community.

Judges who conduct first appearances have a vital role in protecting the community from dangerous offenders as the first appearance judge determines if continued pretrial detention is appropriate. In Escambia County, first appearances in both felony and misdemeanor cases are normally conducted by one of the county judges. How a judge performs this important duty is something that would reasonably be of interest to every voter, especially those who have been victims of violent crime.

There were several reasons why the *Johnson* and *Alsdorf* cases were used in a campaign brochure. First, both involved individuals who had been arrested for

[13] Florida Rule of Criminal Procedure 1.130 requires any arrested person who has not been previously released in a lawful manner be taken before a judicial officer within 24 hours of arrest.

committing violent crimes and were examples of the incumbent's failure to protect the community when performing his judicial duties as first appearance judge. Second, both were recent cases. It would have been unfair to select cases from early in the incumbent's judicial career as early cases may not have been representative of his current judicial philosophy. Third, and perhaps most important, these cases provided voters more than Judge Kinsey's opinion of the incumbent's performance. Four circuit judges addressed the issue of appropriate bonds in these cases, and all four found these two defendants should be held for trial without bond.[14] It is difficult to conceive of information (especially the four circuit judges' implicit opinions of the incumbent's performance) which would be more relevant to a voter attempting to evaluate whether the incumbent was a judge who should be retained in office.

Even if it is assumed that canons other than Canon 7 apply to a judicial candidate who does not hold an Article V office,[15] the *White* decision obviously

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[14] In *Alsdorf,* Circuit Judge Nancy Gilliam issued the original no bond warrant for Alsdorf's arrest for sexual abuse of a ten year old girl. Circuit Judge Laura Melvin later revoked the bond set by the incumbent at first appearance and ordered Alsdorf held without bond pending trial. In *Johnson*, Circuit Judge Ed Nickinson issued a no bond warrant for Johnson's arrest. Circuit Judge Joseph Tarbuck later revoked the bond set by the incumbent at first appearance.

[15] Canon 7 is the only canon that mandates conduct of both a "judge" and a "candidate." All other canons refer only to "a judge" when prescribing or proscribing conduct. "Judge" is defined as meaning an Article V, Florida Constitution judge. "Candidate" is defined as a person seeking selection for or retention in judicial office

affects this charge as it is now clear all restrictions on candidates' speech must pass the strict scrutiny test. The transcript of the JQC hearing is devoid of evidence the information in the campaign brochures in any way affected or impaired the outcome of either case, or could reasonably have been expected to do so. Even if the information might possibly have affected the outcome, the statements in Judge Kinsey's brochure were constitutionally permissible. *Gentile v. State Bar of Nevada*, 111 S.Ct. 2720 (1991). Now that we have the benefit of *White*, it is more apparent this is protected speech.

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by election or retention and includes a "judge" seeking election or retention. Fundamental rules of statutory construction exclude a candidate who does not hold an Article V office from being subject to any canon other than Canon 7.

THE *WHITE* DECISION FURTHER SUPPORTS JUDGE KINSEY DID NOT MAKE KNOWING MISREPRESENTATIONS OF HER OPPONENT IN VIOLATION OF CANON 7(A)(3)(d)(iii)

Although less directly impacted by *White*, the allegations of intentional misrepresentation in JQC Charges No.'s 7 and 9 are protected speech as Canon 7A(3)(d)(iii) was applied to the facts of this case.

Charge No. 7 alleged Judge Kinsey intentionally misrepresented in a campaign brochure that the incumbent had not revoked the bond of an individual named Grover Heller after Heller threatened to kill his elderly parents after being released on bond after an earlier assault. The brochure, composed primarily of reprints of articles and an editorial in the Pensacola News Journal, examined the abusive manner in which the incumbent treated two elderly victims when they appeared before him seeking protection from their mentally disturbed son.

The charge centers on the brochure's use of the language "Judge William Green offered to jail the elderly couple instead!" in the headline followed by "That's right. Instead of revoking Grover Heller's bond and putting this abusive punk in jail, Judge William Green offered to put his elderly parents in jail! Incredible." JQC found this was a knowing misrepresentation because the word "instead" misrepresented the fact that the bond was eventually revoked. However, in making this finding the hearing panel

ignored three specific references in the brochure stating the bond was revoked.[16]

Judge Kinsey believed voters have a legitimate interest in how a judge treats litigants, witnesses, court personnel and attorneys who appear in court. The purpose of this brochure was to give voters information they could use to evaluate how the incumbent treated citizens who appeared before him.[17] His treatment of Heller's parents received significant press coverage when it occurred, and the campaign felt reprints of the newspaper articles would give voters the benefit of the reporter's and editor's disinterested opinions of the incumbent's actions. The newspaper articles also contained incumbent's statement that he "occasionally" asked domestic violence victims if they wanted him to put them in jail. He said this was a technique he used to judge the seriousness of the threat posed by the defendant.

There is a dramatic contrast between communication techniques used in the calm atmosphere of a courtroom and those that must be used in election campaigns

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[16] Judge Green did not revoke Heller's bond to protect his parents; he eventually revoked Heller's bond because Heller had not contacted his public defender.

[17] Assistant state attorney Clara Smith testified this was not the first time she witnessed Judge Green tell a victim he could have them jailed. Smith, who is also a registered nurse, testified that in an earlier case Judge Green threatened to jail a victim who had observable signs of physical injury. (T: 306-307).

to gain the attention of voters and give them information.[18] Population growth and modern society have rendered our forefathers' town meetings ineffective. Candidates need to influence large numbers of voters using mass media techniques.[19] It is understandable JQC is troubled by the use of mass mailing techniques in judicial campaigns, especially when the message is hard hitting, critical of an incumbent (who may be doing a good job in some areas), and which lacks the politeness and decorum required in a courtroom.

The hearing panel found Judge Kinsey guilty of a knowing misrepresentation, and in its factual findings stated "the Heller bond had been revoked and Judge Kinsey knew or should have known" it. While "should have known" is a legally insufficient basis for a violation, more significant is that the hearing panel ignored three specific references in the brochure that the bond was revoked before the hearing ended.

When the Heller bond hearing is examined chronologically, it is apparent the statements in the brochure reasonably reflect the events that occurred. The incumbent was initially asked to protect the elderly victims by revoking their son's bond. How did

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[18] Lots of color, odd sizes and similar techniques are used to attract voters' attention so they will read brochures. Campaign consultant James Spearing testified that if a brochure doesn't grasp a voter's attention within 7 to 10 seconds after it is removed it from the mailbox, it will be thrown in the trash unread. (T: 427-429).

[19] Escambia County had more than 130,000 registered voters in 1998.

he respond to that request? By inserting the language in parentheses, it becomes even clearer the brochure correctly reflected the chronology of events when it stated "Instead of revoking Grover Heller's bond (at that point at the beginning of the hearing) and putting this abusive punk in jail, Judge William Green (initially, before revoking the bond) offered to put his elderly parents in jail! Incredible."

It may be a sad commentary on current society, but the Heller case was a "run of the mill" domestic violence case typical of many handled by our courts on a daily basis. The incumbent's treatment of the elderly victims was the sole reason it attracted attention and became the subject of a brochure. Whether or not he eventually revoked the bond did not affect that issue; if he had not offered to jail Heller's parents, the case would never have been mentioned in the campaign.

The absence of intent to knowingly misrepresent is demonstrated by the ease with which virtually the same statement could have been safely made. Had Judge Kinsey had the slightest hint the use of the word "instead" would be interpreted as a misrepresentation of how Judge Green handled Heller's bond, she could have avoided a violation by simply omitting "instead" from the headline and substituting the word "before" for "instead of," resulting in a phrase that read "That's right. Before revoking Grover Heller's bond and putting this abusive punk in jail, Judge William Green offered to put his elderly parents in jail. Incredible!" Neither minor change would have

diminished the message of the brochure.[20] If Judge Kinsey had intentionally sought to acquire an unfair advantage through misrepresentation, surely she would have been sufficiently astute to make these changes. Even if it is assumed this language is a misrepresentation, at most it is the result of an honest mistake of failing to recognize what is in reality a minor error in syntax.

Charge No. 10 alleged Judge Kinsey made a knowing misrepresentation in a campaign brochure by giving the impression a criminal defendant named Stephen Johnson had been charged with attempted murder and burglary when he appeared before the incumbent for first appearance when those specific charges were not actually pending at that time.

This case began when, in violation of a domestic violence injunction, Stephen Johnson went to his estranged wife's home in the early hours of the morning. Before breaking into her home, he cut the telephone line, unscrewed the bulb in the porch light, and taped a kitchen window to prevent glass from making noise when he broke

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[20] The obvious purpose of the prohibition is to prevent a candidate from gaining unfair advantage by making false statements. At a hearing before Judge Tarbuck on December 18, 1998, Judge Green acknowledged he read the probable cause statement. He also said that based on the "fairly egregious conduct on the part of the defendant," without something other than the probable cause statement, he "couldn't imagine that I would set a bond at $10,000.00."

it.[21] In spite of his efforts, his wife awoke as he entered her home. He attacked and injured her, but her screams alerted a neighbor who called the sheriff's office. Johnson fled the scene before deputies arrived.

Circuit Judge Ed Nickinson issued a no bond warrant for Johnson's arrest. After his arrest, Johnson had a first appearance before Judge Green. In spite of Johnson's prior record,[22] his obvious violation of the domestic violence injunction, and the burglary and attack on his wife, Judge Green set a low bond allowing Johnson to be released. After first appearance the case was assigned to Judge Kinsey, then an assistant state attorney, for prosecution.

After reviewing the case material available to Judge Green at first appearance and speaking to the victim, assistant state attorney Kinsey filed a motion to revoke Johnson's bond. After determining there were no conditions of release sufficient to protect the community from the risk of physical harm, Circuit Judge Joseph Tarbuck revoked the bond and ordered Johnson held for trial without bond.

Assistant state attorney Kinsey charged Johnson with attempted first degree murder, burglary with intent to commit a felony, violation of the domestic violence

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[21] Examination of the crime scene revealed he also attached lengths of duct tape to the porch railing so he could bind his wife after removing her from the home.

[22] Johnson had prior convictions for manslaughter, grand larceny, and robbery.

injunction and false imprisonment. Judge Kinsey readily acknowledged to the hearing panel that these were not the identical charges initially placed by the deputy who arrested Johnson. She admitted she made a mistake when she reviewed the draft of the campaign brochure by failing to recognize this could be misinterpreted. In her mind these had been the charges since her initial involvement in the case and, in the hectic pace of the campaign, she simply missed it.

No one disagrees with prohibiting knowing intentional misrepresentations. For example, had Judge Kinsey falsely accused the incumbent of beating his wife, accepting bribes, or being convicted of DUI, she should be disciplined. However, finding knowing violations in the circumstances of Charges No.'s 9 and 10 is both legally incorrect and sends the wrong message to candidates.

The prohibition against knowing misrepresentations should be used to discipline candidates who make intentional, malicious and substantial misrepresentations to gain unfair advantage over opponents. It shouldn't be a mechanism for sanctioning candidates who make honest mistakes or to second guess them on semantics susceptible to more than one interpretation.

White sends the clear message that candidates for judicial office may not be constitutionally prohibited from discussing, debating and educating voters on relevant issues. Maintaining the integrity of the judiciary, while not impermissibly restricting

candidates' speech, is a worthy, but difficult task. JQC should send the message it will examine campaign literature and discipline those who make intentional, malicious and substantial misrepresentations to gain unfair advantage. However, finding that Judge Kinsey made knowing misrepresentations under the facts of this case sends the message that if a candidate criticizes an opponent's job performance, statements in campaign literature will be considered out of context and searched for minor mistakes that will be used as the basis of allegations of misrepresentation, leaving candidates with the unacceptable conclusion that the only safe method of avoiding discipline is to say nothing critical about their opponents.

CONCLUSION

The statements made by Judge Kinsey in campaign literature and during her radio debate with the incumbent, which are the basis for Charges No. 1, 2, 3, 4, 5, 10 and 12, are constitutionally protected speech under the First Amendment and did not violate the Code of Judicial Conduct.

Judge Kinsey's publication in a campaign brochure of details of the pending cases *State of Florida v. Stephen Johnson* and *State of Florida v. Gerard Alsdorf,* which is the basis of Charge No. 10, was protected speech under the First Amendment and did not violate the Code of Judicial Conduct.

Any mistakes in Judge Kinsey's statements in campaign literature about the incumbent's treatment of the defendant's parents in the *Heller* case and the initial charges in the *Johnson* case, which is the basis of Charge No.'s 7 & 9 were at worst honest mistakes and were clearly not done with the intent to gain unfair advantage by making knowing misrepresentations and did not violate the Code of Judicial Conduct.

Respondent requests, in light of the United States Supreme Court's decision in *White*, this court issue an opinion finding she did not violate the Code of Judicial Conduct and giving candidates in future judicial elections guidance how they may fully and effectively discuss and educate voters on relevant issues such as judicial philosophy and incumbent's job performance, while complying with Canon 7.

CERTIFICATE OF SERVICE

I certify copies of the foregoing have been furnished to:

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CERTIFICATE OF COMPLIANCE - Fla. R. App. P. 9.210(a)(2)

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